Supreme Court, U. S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-983

IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., et al., Petitioners,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CROW & AIKEN
STANLEY D. CROW
CONRAD JOSEPH AIKEN
711 1/2 W. Bannock Street
Post Office Box 972
Boise, Idaho 83701
(208) 345-7561

Counsel for Petitioners

December 1978

TABLE OF CONTENTS

	Page
Table of Cases	v
Statutes	vii
Constitutions	viii
Miscellaneous	viii
Opinion Below	2
Jurisdiction	2
Qeustions Presented	3
Constitutional Provisions and Statutes Involved	5
Statement of the Case . . .	7
Reasons for Granting the Writ	18
I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF ANOTHER COURT OF APPEALS ON THE "SUBSTANTIAL FEDERAL QUESTION" ISSUE . .	18
II. THE DECISION BELOW DECIDES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	19

Page

A. Application of Summary Actions by this Court to Issues not Raised in Lower Court 20

B. The Patient's Right of Free Choice 22

C. The Right to Participate in the Licensing Process, Fairly Conducted 27

D. Restriction of Academic Freedom 30

E. The Right to Present Evidence 33

Conclusion 37

Appendices

Appendix A (List of Petitioners and Respondents) A-1

Appendix B (Opinion and Judgment of Court of Appeals) B-1

Appendix C (Opinion and Judgment of the Maryland Federal District Court). C-1

Page

Appendix D (Opinion and Judgment of the North Carolina Federal District Court) D-1

Appendix E (Opinion and Judgment of the South Carolina Federal District Court) E-1

Appendix F (Opinion and Judgment of the Wyoming Federal District Court) F-1

Appendix G (Annotated Code of Maryland) G-1

Appendix H (North Carolina General Statutes) H-1

Appendix I (Code of Laws of South Carolina, 1976 Annotated) I-1

Appendix J (Wyoming Statutes) J-1

Appendix K (28 U.S.C. §1331(a)) K-1

Appendix L (42 U.S.C. §1983) L-1

Appendix M (First Amendment) M-1

Appendix N (Ninth Amendment N-1

	Page
Appendix O (Eleventh Amendment)	O-1
Appendix P (Fourteenth Amendment)	P-1
Appendix Q (Denial of Rehearing by Court of Appeals)	Q-1

TABLE OF CASES

	Page
Carey v. Population Services International, 431 U.S. 581 (1977)	36
Collins v. Texas, 223 U.S. 288 (1912)	29
Dent v. West Virginia, 129 U.S. 114 (1889)	29
Doe v. Bolton, 410 U.S. 179 (1973)	25
England v. Louisiana State Board of Medical Examiners, 259 F.2d 626 (5th Cir. 1958) . . .	19,34
Gibson v. Berryhill, 411 U.S. 564 (1973)	28
Hitchcock v. Collenberg, 140 F. Supp. 894 (D.Md. 1956), aff'd, 353 U.S. 919 (1957) . .	16
In re Practice of Naturopathy Litigation, 434 F. Supp. 1240 (JPML 1977)	17,22
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	31
Mandel v. Bradley, 432 U.S. 173 (1977)	20,21,22
Rizzo v. United States, 432 F. Supp 356 (D.N.Y. 1977) . .	30
Roe v. Wade, 410 U.S. 113 (1973)	23,24

	Page
Singleton v. Wulff, 428 U.S. 106	20
State v. Biggs, 133 N.C. 729 (1903)	27
Stuart v. Wilson, 211 F.Supp. 700 (D. Texas 1962), aff'd, 371 U.S. 576 (1963)	19
Stuart v. Wilson, 293 F.2d 914 (5th Cir. 1961)	18
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	26
Wooley v. Maynard, 430 U.S. 705 (1977)	33

STATUTES

United States Code	Page
28 U.S.C. Section 1331	5,7, 18, K-1
28 U.S.C. Section 1254(1)	2
42 U.S.C. Section 1983	5,7, 18,L-1
Annotated Code of Maryland, 1976 Supplement	
Art. 43, Section 119	5, G-1
Art. 43, Section 120	5, G-2
Art. 43, Section 121	5, G-4
Art. 43, Section 122	5, G-7
Art. 43, Section 123	6, G-11
North Carolina General Statutes	
Section 90-1	6, H-1
Section 90-2	6, H-1
Section 90-3	6, H-2
Section 90-6	6, H-2
Section 90-9	6, H-3
Section 90-18	6, H-5
Code of Laws of South Carolina (1976 Annotated)	
Section 40-31-10	6, I-1

Page

Section 40-47-10 . . . . . 6, I-1

Section 40-47-40 . . . . . 7, I-3

Section 40-47-90 . . . . . 7, I-4

Wyoming Statutes

Section 33-327 . . . . . 7, J-1

Section 33-328 . . . . . 7, J-2

Section 33-330 . . . . . 7, J-3

Section 33-333 . . . . . 7, J-4

Section 33-342 . . . . . 7, J-8

CONSTITUTIONS

United States Constitution

First Amendment 7,31, M-1

Ninth Amendment N-1

Eleventh Amendment 5, 7, 16, O-1

Fourteenth Amendment . . . 5, 7, P-1

MISCELLANEOUS

Dorland's Illustrated Medical Dictionary (25th Ed. 1974) . . 10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. _____

THE IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., et al, Petitioners,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION, et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners [1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth

---

[1] For list of petitioners and respondents, see Appendix A.

Circuit entered in this proceeding on August 28, 1978.

OPINION BELOW

The Opinion of the Court of Appeals, reported at 582 F. 2d 849 (1978), appears in Appendix B hereto, and that court's denial of the petition for rehearing appears at Appendix Q. The Opinions rendered by the District Courts of the Districts of Maryland, North Carolina, South Carolina and Wyoming appear in Appendices C, D, E and F hereto, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 28, 1978. A timely petition for rehearing was denied on September 21, 1978, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the several states may limit participation in the existing process for licensing the practice of medicine, by limiting the right to apply and be examined for licensure to graduates of those medical schools which adhere to the currently prevailing medical theory (allopathic) and by denying that right to graduates of those medical schools which adhere to a minority theory (naturopathic).

2. Whether the several states may limit the right of patients to select their medical treatments so that they must in all circumstances choose treatment by a graduate of a medical school which adheres to the currently prevailing medical theory (allopathic), instead of by a graduate of a medical school which adheres to a minority theory (naturopathic).

3. Whether the several states may prohibit medical practice by physicians who adhere to a minority medical theory (naturopathic) unless their qualifications are evaluated and approved by a licensing agency composed of physicians who adhere to the currently prevailing medical theory (allopathic) and represent a competitor profession which is opposed to naturopathy and yet unfamiliar with its scientific base and practical efficacy.

4. Whether an action raising the foregoing questions states a "substantial federal question".

5. Whether the parties who raise the foregoing questions have the right to present evidence to the finder of fact that there is neither a compelling state interest which justifies the states' requirements nor a rational connection between those requirements and the end sought to be achieved.

6. Whether the district courts had jurisdiction to consider these questions, under 28 U.S.C. §1331, the Fourteenth Amendment, 42 U.S.C. §1983, or as "pendent party" jurisdiction, notwithstanding the Eleventh Amendment, the abstention doctrine, and principles of comity.

7. Whether the petitioners have standing to raise these issues.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Annotated Code of Maryland	Appendix	Page
Art. 43, §119, Definitions	G	G-1
Art. 43, §120, Board of Medical Examiners	G	G-2
Art. 43, §121, Powers and Duties of Board	G	G-4
Art. 43, §122, Practice with-		

	Appendix	Page
out License and Registration Prohibited	G	G-7
Art. 43, §123, Qualifications of Applicants for License	G	G-11
North Carolina General Statutes		
§90-1, North Carolina Medical Society	H	H-1
§90-2, Board of Examiners	H	H-1
§90-3, Medical Society Appoints Board	H	H-2
§90-6, Regulations Governing Applicants for License, Examinations, etc	H	H-2
§90-9, Examination for License; Scope; Conditions and Prerequisites	H	H-3
§90-18, Practicing without License	H	H-5
Code of Laws of South Carolina (1976 Annotated)		
§40-31-10, Practice [of Naturopathy] Unlawful	I	I-1
§40-47-10, State Board of Medical Examiners	I	I-1

	Appendix	Page
§40-47-40, "Practice of Medicine" Defined	I	I-3
§40-47-90, Eligibility for Examination	I	I-4
Wyoming Statutes		
§33-327, Practice of Medicine Defined	J	J-1
§33-328, State Board of Medical Examiners	J	J-2
§33-330, Duties of Board	J	J-3
§33-333, Application for License	J	J-4
§33-342, Effect of Violation	J	J-8
Federal Statutes and Constitution		
28 U.S.C. §1331(a)	K	K-1
42 U.S.C. §1983	L	L-1
First Amendment	M	M-1
Ninth Amendment	N	N-1
Eleventh Amendment	O	O-1
Fourteenth Amendment	P	P-1

STATEMENT OF THE CASE

Like most other states, the four involved here maintain a licensing system which was intended to assure that health

practitioners have at least the minimum qualifications to administer medical treatments to the public, but which in fact, as now constructed, quite needlessly both constricts the free marketplace of ideas in health care and denies to each patient the opportunity to utilize whatever healing art he chooses for himself.

Although those legislators who designed the medical licensing system probably assumed that there was and would always be only one health care delivery system, the Complaint describes the emergence of an alternate system--an alternate which is in fact so distinct in its principles and techniques from those in vogue in the established system that the alternate system and the established one in fact represent two separate professions and two separate health care delivery systems, although both fall within the broad statutory definitions of the "practice of medicine".

The legislative assumption was that the entire scope of health care research and delivery would always be within the purview of the schools which grant the "doctor of medicine" degree--that whatever new ideas would come forth, those with merit would be the product of the "doctor of medicine" schools. Upon that assumption, these legislatures and most others eventually decided, with exceptions not pertinent here, to license only those who graduate from the "doctor of medicine" schools (although seven states, the District of Columbia, five provinces of Canada, and many nations in Europe and elsewhere license naturopathy).

Through a gradual process, however, all "doctor of medicine" schools in the

United States have become solely allopathic in concept, which means, according to Dorland's Illustrated Medical Dictionary (25th Ed. 1974), that they rely upon the administration of treatments (largely through chemical drugs and surgery) which are unlike the symptoms being treated.

The Complaint describes the statutory monopoly given the "doctor of medicine" schools, a monopoly which both perpetuates itself and (as monopolies always do) prevents any opposing idea from challenging its position. The graduates of the "doctor of medicine" schools, all of whom were taught allopathy, are the only ones who are allowed to take the licensing examination, and become the only licensed practitioners, the only professional members of licensing boards, and the only ones who accredit "doctor of medicine"

schools.

As described in the Complaint, naturopathy endorses treatment by means and by materials that are found in nature and help the body heal itself, without symptom-suppression through chemicals. The Complaint describes naturopathy as both safe and efficacious and alleges that the examining boards deny licensure to the naturopathic physician plaintiffs because of a policy to suppress naturopathy rather than because of any lack of qualifications.

Naturopathic physicians (who hold the "doctor of naturopathy" degree) are not allowed to take either the same examination offered to "doctor of medicine" degree-holders or any other examination, and that fact lies at the center of this litigation: Naturopathic physicians are not allowed to demon-

strate their ability and credentials.

The Complaint asks that naturopathic physicians be allowed to participate in the process--not necessarily that a new process be created with any special provisions or recognition for naturopathy.

It was on this point that the Court of Appeals misunderstood the issue raised by the Complaint, because the Court of Appeals assumed (erroneously) that the Complaint asks for special recognition and privileges for naturopathy. Quite the contrary, the Complaint seeks the opportunity for naturopathic physicians to demonstrate that they can pass the same examination holders of the "doctor of medicine" degree take and that naturopathic physicians are at least equally able to practice safely and efficaciously.

The Complaint asserts, on behalf of lay plaintiffs as consumers of health

care, that these consumer-patients are being denied the opportunity to receive naturopathic treatments, which they would otherwise choose.

In the lower courts, the petitioners sought an opportunity to present their evidence to show that the states' licensing structures, as applied in these facts, deny academic freedom and the patient's right to select the care for his own person and effectively prohibit, rather than regulate, an entire avenue of health care. Thus far there has been no opportunity to prove their allegations.

Petitioners rely upon the First, Ninth and Fourteenth Amendments.

Petitioners are naturopathic physicians and some of their patients, students of naturopathy, certain naturopathic physicians' professional organizations, and a patients' rights organi-

zation. Respondents are the United States Food and Drug Administration, the Secretary of Health, Education and Welfare, the States of North Carolina, South Carolina, Maryland, and Wyoming and their agencies regulating medicine and pharmacy, and certain counties in North Carolina, South Carolina, and Maryland.

Petitioners brought four separate actions in the federal district courts of North Carolina, South Carolina, Maryland, and Wyoming. The Petitioner naturopathic physicians sought a judgment declaring the right to demonstrate their qualifications to practice naturopathy (such as by means of the same examination taken by other physicians), the right to be examined by state boards which are competent to understand naturopathy and which are not prejudiced against it because of economic competition or

other bias, declaring the scope of naturopathy and its distinction from the practice of medicine generally, so that it can be determined whether an unbiased and competent licensing process exists, and declaring the right to develop, promote, and maintain a strong and qualified profession of naturopathy. The patients and patients' rights organization sought a judgment declaring their right to free choice of treatment by the system of naturopathy and physicians specializing in naturopathy. The actions broadly challenged county, state, and federal statutes, regulations, and administrative practices which restrict or prohibit the enjoyment of these rights, but most of those restrictions result from the statutes which create the licensure system, which is the focus of this petition.

The district court for South

Carolina ruled that the petitioners did not assert a substantial federal question with respect to the state and county respondents. The district court for Maryland ruled that the petitioners lacked standing and presented no "case or controversy," and even if they did, Maryland's regulation was constitutional under Hitchcock v. Collenberg, 140 F. Supp. 894 (D. Md. 1956), aff'd, 353 U.S. 919 (1957). The district courts for Wyoming and North Carolina ruled that the states and their agencies were immune from suit under the Eleventh Amendment, and the North Carolina court added that abstention was appropriate as the petitioners had not shown that state remedies were inadequate. After the state and county respondents were dismissed from the Wyoming and South Carolina cases, the Judicial Panel on Multidistrict Liti-

gation ordered the cases transferred to the United States District Court for the District of Maryland. In re Practice of Naturopathy Litigation, 434 F. Supp. 1240 (JPML 1977).

Petitioners appealed the decisions of the federal district courts from the four states to the United States Court of Appeals for the Fourth Circuit, which had jurisdiction over the cases after transfer by the Judicial Panel on Multidistrict Litigation. The Fourth Circuit affirmed the lower courts on August 28, 1978, but considered only one ground therefor; viz., the want of a substantial federal question.

Petitioners sought a rehearing before the Fourth Circuit for the reason that the Court had misunderstood petitioners' arguments and had in fact based its affirmance on a contention not made

by the petitioners. The Fourth Circuit denied the petition for rehearing on September 21, 1978.

Jurisdiction of the district courts was based upon 28 U.S.C. §1331(a), 42 U.S.C. §1983, the Fourteenth Amendment, and the doctrine of "pendent party" jurisdiction (pendent to jurisdiction over the federal defendants).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF ANOTHER COURT OF APPEALS ON THE "SUBSTANTIAL FEDERAL QUESTION" ISSUE.

The Court of Appeals affirmed dismissal of these cases, saying they presented no "substantial federal question". To the contrary is Stuart v. Wilson, 293 F. 2d 914 (5th Cir. 1961), where it was alleged that the Texas Medical Practice

Act violated the rights of certain naturopathic physicians by precluding the practice of naturopathy. (There, however, on remand and after trial, the particular restrictions were found reasonable by the district court, 211 F. Supp. 700 (D. Texas 1962), which decision was affirmed by this Court, 371 U.S. 576 (1963).)

The decision of the Fourth Circuit conflicts, also, with England v. Louisiana State Board of Medical Examiners, 259 F. 2d 626 (5th Cir. 1958), which allowed chiropractors to present evidence to show that the requirements then imposed on chiropractic physicians were unreasonable.

II.

THE DECISION BELOW DECIDES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS

COURT.

A. Application of Summary Actions by This Court to Issues Not Raised in Lower Courts.

The Court of Appeals mis-applied Mandel v. Bradley, 432 U.S. 173 (1977), by taking the position that a summary dismissal or affirmance by this Court rejects all issues raised in the jurisdictional statement, whether or not the issues in the jurisdictional statement had been presented in the court below. Under Mandel, supra, summary dispositions prevent the lower courts from coming to opposite conclusions "on the precise issues presented and necessarily decided", but the long-accepted rule is that the Court will not consider an issue not passed upon by the lower court. Singleton v. Wulff, 428 U.S. 106, 120 (1976).

Moreover, summary actions are not,

per Mandel, supra, to be understood as breaking new ground.

Only by citing language in jurisdictional statements was the Court of Appeals able to find any possibility that this Court had already decided that the issues raised by the Complaint in this case did not state a "substantial federal question". Even as cited by the Court of Appeals, there is very little similarity between the issues raised in this case and those in any of the jurisdictional statements referred to by the Court of Appeals. In any event, this Court has not in any instance decided the questions presented in this case, but the Court of Appeals relied upon language, developed for the first time on the appeal, in the jurisdictional statements as proof that this Court had decided these issues, although they had

not been considered by the lower courts.

That simply does not fit with Mandel, supra, and would have the effect of expanding the effect of summary actions far beyond their intended scope.

B. The Patient's Right of Free Choice

The Petitioners in this case are 105 individuals and 11 organizations who are concerned with their rights to practice and receive treatment by a health care system which they assert to be safe and efficacious. They are but the tip of an iceberg; pending at the present time are actions similar to these four cases in the federal district courts of twenty-six other states, all of which have been transferred to the district court in Maryland for pre-trial proceedings. In re Practice of Naturopathy Litigation, supra. The broad questions raised directly bear on the delivery and availability of

health care for all Americans.

The practical result is that what is asserted to be a perfectly valid system of health care has, without hearing, been effectively made unavailable to citizens in an era when health care costs are spiralling and shortcomings in conventional medicine are becoming apparent. If the system is safe and efficacious as petitioners assert, then every potential user of medical services in this country has been deprived of a valuable resource.

This Court has spoken of the right of privacy in health care, but the further development of these concepts is urgently needed.

The patient's right to select naturopathic care is based on the right of privacy principle announced in Roe v. Wade, 410 U.S. 113, (1973):

"This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent." 410 U.S. 153 (emphasis added).

Judtice Douglas' concurring opinion in Roe v. Wade further recognized the right:

"The right of privacy--the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment--becomes only a matter of theory, not a reality, when a multiple-physician approval system is mandated by the State.

"...

"The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values."

The defendant states may not regulate the delivery of health care services in a manner which unduly intervenes in the selection of health care:

"The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview...

"We conclude that the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician. To ask more serves neither the hospital nor the State." Doe v. Bolton,

supra, at 410 U.S. 197-198.

Analagous authority for the recognition of a patient's right of choice as to physician and system of treatment is found in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 769, 770 (1976):

> "The challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance....
>
> "...
>
> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information [price information on prescription drugs] is not in itself harmful, that people will perceive

> their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them...But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."

The patient's right of choice was recognized at least as far back as 1903:

> "This is a free country, and any man has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use." State v. Biggs, 133 N.C. 729, 736 (1903).

C. The Right to Participate in the Licensing Process, Fairly Conducted

The petitioners who are naturopathic physicians have simply said that

their learning and discipline are real, distinct, and entitled to dignity and they are willing to prove it by taking either the same examinations for medical licensure that other physicians take or one devised for them.

They ask only that the examination procedure be fairly administered and that persons who for competitive and other reasons oppose naturopathy not be the sole judges of their examination results and that there be persons to grade the examination who are familiar with its scientific base and practical efficacy. Petitioners thus ask to be judged through an impartial, informed process.

In Gibson v. Berryhill, 411 U.S. 564 (1973), a group of salaried optometrists sued a state optometry board to enjoin the board's consideration of re-

voking their licenses. This Court upheld the disqualification of the board to judge whether licenses should be revoked because the members of the board had a substantial pecuniary interest in the outcome.

In Dent v. West Virginia, 129 U.S. 114 (1889), this Court held that states must be fair in the licensing process and as part of that fairness, the authority must be competent to judge:

> "Few professions require more careful preparation by one who seeks to enter it than that of medicine... Reliance must be placed upon the assurance given by him license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications..." 129 U.S. 122 (emphasis added).

See Collins v. Texas, 223 U.S. 288 (1912):

> "We should presume, until the Texas courts say otherwise...that the diploma of the

> plaintiff in error would not be rejected merely because it came from a school of osteopathy. In short, the statute says that if you want to do what it calls practicing medicine, you must have gone to a reputable school in that kind of practice. Whatever may be the osteopathic dislike of medicines, neither the school nor the plaintiff in error suffers a constitutional wrong if his place of tuition is called a medical school by the act for the purpose of showing that it satisfied the statutory requirements." 223 U.S. 296. (Emphasis added.)

D. Restriction of Academic Freedom

It should be understood that medicine "is not an exact science," Rizzo v. United States, 432 F. Supp. 356, 360 (D. N.Y. 1977). No one has all the answers. The attempt of the respondents to establish a monopoly for that portion of health care knowledge now in the

possession of the currently prevailing medical theory (allopathy) results in the repression of academic study and research into what petitioners assert is a safe and efficacious system of health treatment. This is in conflict with First Amendment principles announced by this Court in Keyishian v. Board of Regents, 385 U.S. 589 (1967), where the Court refused to "tolerate laws that cast a pall of orthodoxy over the classroom":

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of

American schools.' Shelton v. Tucker, supra, 364 U.S. at 487, 5 L. Ed. 2d at 236. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' United States v. Associated Press, 52 F. Supp. 362, 372. In Sweezy v. New Hampshire, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 1324, 77 S.Ct. 1203, we said:

"'The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

> No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.'" 385 U.S. 603 (emphasis added).

A state may not pursue even legitimate and substantial government purposes through means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved," Wooley v. Maynard, 430 U.S. 705, 716 (1977).

E. The Right to Present Evidence

Petitioners have sought to prove that theirs is a safe and efficacious healing art, entitled to licensure and dignity, but they have not been allowed to present evidence on the point. That

they should be so allowed is supported by England v. Louisiana State Board of Medical Examiners, 259 F. 2d 626 (5th Cir. 1958):

> "In the thirty odd years since that decision was rendered, we judicially know that the healing art in general has made further enormous progress away from the ancient days when barbers did the blood letting. Can we say without hearing the evidence that chiropractic is no more entitled to recognition today than it was thirty odd years ago? It is claimed that the practice of chiropractic has now been legalized in forty-four of the States, in Hawaii, and in the District of Columbia, and that respectable colleges of chiropractic have been founded with courses comparable in length and claimed to be equal in quality to the medical colleges. It is not denied that the state may regulate, within reasonable bounds, the practice of chiropractic for the protection of the public health; but it is claimed that the requirement of a diploma from a college approved by the American Medical Association and a knowledge of surgery and materia medica bear no reasonable relation to the practice of chiropractic. Without hearing the evidence, we cannot say that those claims are untrue, or that a reasonable man might not intelligently choose a chiropractor for the treatment of some particular ailment. We hold simply that the plaintiffs are entitled to a day in court, to an opportunity to prove their case..." 259 F. 2d 627 (emphasis added).

It is not contended that the states do not have the right to regulate naturopathy. It is contended, however, that they must do so in a manner that does not impose requirements or burdens on naturopathy which are not substantially related to the states' interest in protecting health. The states must justify their

burdening naturopathy by evidence of their relational interest. This Court stated in Carey v. Population Services International, 431 U.S. 581 (1977):

> "Of particular relevance here is Doe v. Bolton, supra, in which the Court struck down, as unconstitutionally burdening the right of a woman to choose abortion, a statute requiring that abortions be performed only in accredited hospitals, in the absence of proof that the requirement was substantially related to the State's interest in protecting the patient's health." 431 U.S. at 689 (emphasis added).

The Fourth Circuit erroneously assumed that the question of the reasonableness of the requirement of licensure as a doctor of medicine (as a condition upon the right to practice naturopathy) is solely a question of law to which the doctrine of stare decisis applies, in

determining whether the licensing statute is constitutional on its face, rather than a mixed question of law and fact, as to which petitioners may introduce evidence to show that the licensing statute is unconstitutional as applied to these petitioners.

CONCLUSION

The decision below has the following effects:

(1) It upholds state refusals to allow naturopathic physicians even to apply for licensure and to demonstrate their qualifications, upon examination;

(2) It allows states to prohibit, not merely regulate, a safe and efficacious system of healing;

(3) It upholds a state requirement of the doctor of medicine degree as the only degree which entitles its holder to licensure;

(4) It allows, on constitutional grounds, a state to

establish a state system of healing which restricts academic inquiry;

(5) It upholds regulation or licensure of one profession by members of a competitor profession;

(6) It upholds the selection of persons who are not competent to judge qualifications for licensure;

(7) It denies the right of a patient to select a system of treatment; and

(8) It denies a party's right to present evidence to show that a pertinent statute is unconstitutional as applied to that party, where the right to present such evidence is asserted.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

CROW & AIKEN
Stanley D. Crow
Conrad Joseph Aiken
711 1/2 West Bannock St.
Boise, Idaho 83701
(208) 345-7561
Counsel for Petitioners

December 18, 1978

APPENDIX A

Petitioners

Name	Description
The Idaho Association of Naturopathic Physicians, Inc., a corporation	Physicians' Organization
National Association of Naturopathic Physicians, a corporation	Physicians' Organization
National Health Federation, a corporation	Patients' Organization
Alaska Association of Naturopathic Physicians	Physicians' Organization
American Association of Constitutional Medicine	Physicians' Organization
Maryland State Homeopathic Medical Society	Physicians' Organization
Michigan Association of Naturopathic Physicians	Physicians' Organization
New York Association of Naturopathic Physicians	Physicians' Organization
Oregon Association of Naturopathic Physicians	Physicians' Organization

Petitioners (continued)

Name	Description
Texas Association of Naturopathic Physicians	Physicians' Organization
Washington Association of Naturopathic Physicians, a corporation	Physicians' Organization
Harry Earl Moore	Physician
H. Gordon Hurlburt	Physician
Nancy E. Huntoon	Physician
Barry S. Taylor	Student
Robyn E. Leavy	Student
Bruce Alexander Dickson	Student
Joseph E. Pizzorno	Physician
Jerry G. Martinez	Physician
Howard Gary Fine	Physician
Stephen A. Messer	Student
Pearlyn Goodman	Student
George L. Gunther	Physician
William B. Henry	Physician
Robert William Wyman	Physician

Petitioners (continued)

Name	Description
Franne Rosenbaum	Physician
Douglas A. Rosenbaum	Physician
Andrew E. Hefner	Physician
Harold A. Knackstedt	Physician
Clifford Passen	Student
Albert William Aquirre	Physician
Alan Moskowitz	Physician
J.R. Critchlow	Physician
Timothy A. Binder	Physician
M. Marlene Briggs	Physician
A.M. LaRusch	Physician
Harold Dick	Physician
Kenneth R. Piller	Physician
Thomas W. Stowell	Student
Steven Palley	Student
Robert S. Kline	Student
Robert A. Marshall	Physician
Timothy R. Dooley	Student
J. Franklin Lee	Physician

Petitioners (continued)

Name	Description
Joseph A. Rombough	Physician
Joseph E. Marshall	Physician
Robert E. Pritchard	Physician
W. Calvin Gray	Physician
Nina Gray	Physician
B.R. Blinzler	Physician
Cyrus E. Maxfield	Physician
Kurt E. Schulz	Physician
Annie E. Litle	Physician
Lago U. Kim	Physician
Samuel P. Wagner	Physician
Paul K. Hong;	Physician
Kenneth L. Sanders	Physician
Ronald R. Hoye	Physician
George N. Taylor	Physician
David K. Shefrin	Physician
Clyde G. Reynolds	Physician
Karl D. Peterson	Physician
Sherwin G. Mendell	Physician

Petitioners (continued)

Name	Description
John B. Bastyr	Physician
William A. Turska	Physician
Julia Marie Henley	Physician
James S. Sensenig	Student
H.G. Vodicka	Physician
Irvin H. Miller	Physician
Brian Lloyd McCoy	Physician
Afton D. Orchard	Physician
Daniel M. Hardt	Physician
Leo M. Scott	Physician
Doris M. Williams	Physician
Patton D. Pettijohn	Student
Arthur Thomas Brooks	Physician
Kenneth E. Harmon	Physician
Ralph L. Day	Physician
Richard E. Watkins	Physician
Robert M. Pennock	Physician
Roscoe A. Kellogg	Physician
Milton P. Nelson	Physician
Marcel Petit	Physician

Petitioners (continued)

Name	Description
William G. Reimer	Physician
John Christopher	Physician
William B. Marshall	Physician
Rance Palmer	Physician
Barry M. Wachs	Physician
R.M. Finley	Physician
Robert Caverly	Physician
Russel L. Kolbo	Physician
Diane C. Hentges	Patient
Timothy M. Sharpe	Patient
Susan D. Sharpe	Patient
Fern Malberg	Patient
Mrs. J.W. Noble	Patient
Allen Welch	Patient
Glen E. Burgin	Patient
Georgia A. Burgin	Patient
Jaquie Davison	Patient
Clinton Rettkowski	Patient
Caroline Rettkowski	Patient
Marvin C. Neel	Patient
Anne H. Merkley	Patient

Petitioners (continued)

Name	Description
George O. Ball	Patient
Joanne C. Ball	Patient
Gladys Waller	Patient
Larry Dionne	Patient
Edna Dionne	Patient
Modena Flagel	Patient
Teresa Lemon	Patient
Dorothy J. Ward	Patient
Sharon Jones	Patient
Thelma D. Hough	Patient
Forrest F. Hough	Patient
Erde Sun	Patient

Respondents

United States Food and Drug Administration; United States Department of Health, Education, and Welfare; Joseph A. Califano, Jr., in his capacity as Secretary of the Department of Health, Education and Welfare, of the United States of America;

Respondents (continued)

The State of Maryland; the following Counties in the State of Maryland: Baltimore County; The Maryland State Board of Pharmacy; The Maryland Department of Health and Mental Hygiene; and The Maryland Department of Licensing and Regulation; The State of North Carolina; the following Counties in the State of North Carolina; Iredell; Forsyth; and Henderson; The North Carolina State Board of Medical Examiners; The State of South Carolina; The following Counties in the State of South Carolina: Lexington County; The State Board of Pharmaceutical Examiners; Board of Medical Examiners; The State of Wyoming; The following Counties in the State of Wyoming: No specific counties at present; The Wyoming State Board of Pharmacy;

Respondents (continued)

The Wyoming State Board of Medical Examiners; and The Department of Health and Social Services.

APPENDIX B

The IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., a corporation, et al., Appellants,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION et al., Appellees.

The IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., a corporation, et al., Appellants,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION et al., Appellees.

The IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., a corporation, et al., Appellants,

v.

The STATE OF SOUTH CAROLINA, Lexington County, the State Board of Pharmaceutical Examiners, Board of Medical Examiners, Appellees,

United States Food and Drug Administration et al., Defendants.

The IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., a corporation, et al., Appellants,

v.

The STATE OF WYOMING, the Wyoming State Board of Pharmacy, the Wyoming State

Board of Medical Examiners, and the Department of Health, Education, and Welfare, Joseph A. Califano, in his capacity as Secretary of the Department of Health, Education and Welfare of the United States of America, Defendants.

Nos. 77-1346, 77-1908, 77-2593 and 77-2594.

United States Court of Appeals, Fourth Circuit.

Argued May 4, 1978.

Decided August 28, 1978.

Before WINTER, BUTZNER and HALL, Circuit Judges.

BUTZNER, Circuit Judge:

In these four substantially identical cases, practitioners and students of naturopathy, patients desiring naturopathic treatment, and associations promoting naturopathy (collectively referred to as naturopaths) seek broad declaratory and injunctive relief assuring the opportunity to study and practice naturopathy and to be treated according to its methods.[1]

---

1. Jurisdiction is alleged to exist under

The defendants are the Food and Drug Administration; the Secretary of Health, Education, and Welfare; the states of North Carolina, South Carolina, Maryland, and Wyoming and their agencies regulating medicine and pharmacy; and certain counties in North Carolina, South Carolina, and Maryland. The naturopaths appeal the dismissal of all county and state defendants from these actions.[2] We affirm.

---

28 U.S.C. §§ 1331 (a) (federal question); 1346(a)(2) (United States as a defendant); 2201 (declaratory judgments); and 42 U.S.C. § 1983 (civil rights). The complaint also alleges pendent jurisdiction over the states and their agencies.

2. After the state and county defendants were dismissed from the Wyoming and South Carolina actions, these cases were transferred to the United States District Court for the District of Maryland by order of the Judicial Panel on Multidistrict Litigation. In re Practice of Naturopathy Litigation, 434 F.Supp. 1240 (Jud.Pan. Mult.Lit., 1977). The dismissals were subsequently certified for appeal under Federal Rule of Civil Procedure 54(b).

Each complaint seeks a declaratory judgment defining naturopathy as

> . . . a separate and distinct healing art, science and philosophy of medicine, that is, the art, science and philosophy of natural healing, by application of the laws of nature to the human body for its care and to prevent disease by any means that will assist the self-healing processes of the body.

The naturopaths explain that this definition describes a broad range of practice illustrated by some 80 specialties such as cardio-vascular medicine, dermatology, and orthopedics. They also claim that they should be permitted to use and prescribe a variety of natural foods and medicine, including animal and vegetable substances, herbs, and non-narcotic prescription drugs. They request a declaratory judgment that the fifth and fourteenth amendments guarantee rights to practice, teach, and receive instruction in naturopathy. They also

seek a judgment that every statute, regulation, and administrative practice or policy of the state and county defendants that restricts naturopathy more narrowly than the asserted definition is void and unenforceable as to all plaintiffs.

The naturopaths raise a number of constitutional issues. They allege violations of the due process and equal protection clauses because of the defendants' refusal to license practitioners of naturopathy notwithstanding the qualifications of the applicants. They assert that naturopathy is a healing art distinct from the orthodox practice of medicine. Consequently, they challenge the validity of state laws regulating medicine that sweep so broadly as to encompass naturopathy. They also allege that their rights to equal protection and due process are violated by state regulations that give medical doctors, who have

a competing pecuniary interest, the power to establish licensing requirements for the separate discipline of naturopathy. They argue that ordinary doctors are not competent to judge the qualifications of a naturopath.

They assert that their freedom of academic inquiry under the first and fourteenth amendments is impaired by state regulation that creates a monopoly in favor of orthodox medicine. They voice similar complaints about regulations that make the practice of naturopathy unprofessional conduct warranting revocation of a medical license and that restricts the scope of research in health care to state-designated lines of inquiry.

Additionally, the naturopaths allege that statutes and regulations barring their profession abridge the rights of both patients and practitioners to unimpeded interstate travel secured by the privileges and immunities clauses of Article IV and the fourteenth amendment. Their patients, they claim, have a right to a reasonable choice of treatment arising from the right to privacy secured by the fifth, ninth, and fourteenth amendments. Finally, the naturopaths contend that naturopathy has advanced to such a degree that they should be allowed to present evidence that a state may no longer reasonably require a medical degree for its practice.

II.

The Maryland district court, in No. 77-1908, ruled that while the allegations respecting the jurisdictional amount under § 1331(a) were sufficient, the naturopaths lacked standing and presented no "case or controversy." The court also ruled that even if it accepted jurisdiction, Hitchcock v. Collenberg, 140

F.Supp. 894 (D.Md.1956), aff'd, 353 U.S. 919, 77 S.Ct. 679, 1 L.Ed.2d 718 (1957), established the constitutionality of Maryland's regulation of this matter.

The South Carolina district court, in No. 77-2593, ruled that the naturopaths had presented no substantial federal question with respect to the state and county defendants. The court considered itself bound by the results in two previous suits, Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177, appeal dismissed for want of a substantial federal question, 352 U.S. 939, 77 S.Ct. 263, 1 L.Ed.2d 235 (1956), and Beck v. McLeod, 240 F.Supp. 708 (D.S.C.1965), aff'd, 382 U.S. 454, 86 S.Ct. 645, 15 L.Ed.2d 522 (1966).

The Wyoming district court ruled in No. 77-2594 that the state and its agencies were immune under the eleventh amendment.

In No. 77-1346, the North Carolina district court held that the county defendants lacked the power to deprive the naturopaths of their asserted rights. It ruled that although the naturopaths had satisfied the jurisdictional amount under § 1331(a), the eleventh amendment immunized the state defendants. Finally, it held that abstention was appropriate because the naturopaths had not shown that an adequate remedy was unavailable in the state courts.

Although we uphold the judgments of dismissal in all four cases, we find it necessary to address only the issue concerning the existence of a substantial federal question.

III.

The Supreme Court has recently reiterated that a complaint must be dismissed when the federal question invoked

as the basis for a district court's jurisdiction is "plainly unsubstantial . . . because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy,'" Hagans v. Lavine, 415 U.S. 528, 537, 94 S.Ct. 1372, 1379, 39 L.Ed.2d 577 (1974). See 13 Wright, Miller, and Cooper, Federal Practice and Procedure § 3564, at 427-29 (1975). Even when the Court summarily affirms or dismisses an appeal, its judgment must be recognized by inferior courts as a decision on the merits of the issues presented. Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977); Hicks v. Miranda, 422 U.S. 332, 343-45, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). Since 1948, the Supreme Court has summarily affirmed

or dismissed at least seven cases challenging state regulation of naturopathy. We must therefore examine the opinions and jurisdictional papers on which the Court based its dispositions. Mandel v. Bradley, 432 U.S. at 180, 97 S.Ct. 2238 (Brennan, J., concurring).

In Davis v. Beeler, 185 Tenn. 638, 207 S.W.2d 343 (1947), appeal dismissed for want of a substantial federal question, 333 U.S. 859, 68 S.Ct. 745, 92 L.Ed. 1138 (1948), naturopaths claimed that they had been unconstitutionally deprived of liberty and property interests by a Tennessee law withdrawing recognition from naturopathy as a separate branch of medicine but allowing methods used by naturopaths to be used by other licensed practitioners. The Supreme Court of Tennessee rejected these arguments and sustained the legislature's power to require that practitioners of limited

branches of the healing arts obtain a general practitioner's license. 207 S.W. 2d at 345. The jurisdictional statement filed with the United States Supreme Court reveals that these due process and equal protection claims were directly presented on appeal.

In Taylor v. Oklahoma, 291 P.2d 1033 (1955), appeal dismissed for want of a substantial federal question, 352 U.S. 805, 77 S.Ct. 33, 1 L.Ed. 2d 38 (1956), the Supreme Court of Oklahoma affirmed an order restraining a naturopath from practicing. All of the issues raised in the jurisdictional statement filed with the United States Supreme Court asserted the unconstitutionality of Oklahoma's regulation of the healing arts under the due process, equal protection, and privileges and immunities clauses. The naturopath argued that his calling was

distinct from orthodox medicine and that the state's failure to license naturopaths hindered the development of the science and deprived the public of its right to a choice of physicians.

In Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177, appeal dismissed for want of a substantial federal question, 352 U.S. 939, 77 S.Ct. 263, 1 L.Ed. 235 (1956), the Supreme Court of South Carolina found no violation of the due process or equal protection clauses in a state statute that withdrew authorization to practice naturopathy and prescribed qualifications for former licensed naturopaths who wished to become licensed as doctors of medicine. The appeal to the United States Supreme Court asserted a deprivation of property without due process of law because the statute prohibited the practice of naturopathy by anyone, regardless of his medical qualifications. The appeal

also asserted a violation of the equal protection clause on the ground that the statute made qualification as a doctor of medicine more difficult for a former naturopath than for other applicants.

In Hitchcock v. Collenberg, 140 F.Supp. 894 (D.Md. 1956), aff'd, 353 U.S. 919, 77 S.Ct. 679, 1 L.Ed.2d 718 (1957), a three-judge district court sustained Maryland's Medical Practice Act against federal constitutional attacks. On appeal to the United States Supreme Court, the statute was challenged as violating the equal protection and due process clauses because naturopaths were required to pass examinations in non-naturopathic subjects to qualify to practice naturopathy and because exclusive control over naturopaths was conferred on their medical competitors. Violations of anti-trust laws were asserted on the grounds that the

Maryland statute established orthodox medicine as the preferred state system of healing and curbed the progress of the art of health care. The naturopaths also urged that the statute interfered with the rights of patients to choose a mode of treatment, that it unconstitutionally suppressed the advancement of the science of naturopathy, and that the state's police power extended only to regulating naturopathy--not to banning it. In its summary affirmance the Supreme Court cited Taylor v. Oklahoma, 352 U.S. 805, 77 S.Ct. 33, 1 L.Ed.2d 38 (1956); Dantzler v. Callison, 352 U.S. 939, 77 S.Ct. 263, 1 L.Ed.2d 235 (1956), and Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889).

In State v. Errington, 355 S.W. 2d 952, appeal dismissed for want of a substantial federal question, 371 U.S. 3, 83 S.Ct. 27, 9 L.Ed.2d 48 (1962), the

Supreme Court of Missouri relied on Hitchcock v. Collenberg, 140 F.Supp. 894 (D. Md.1956), and the summary affirmance of that case by the Supreme Court in upholding the conviction of a self-proclaimed naturopath for practicing medicine without a license. On appeal to the United States Supreme Court, the naturopath asserted violations of the due process and equal protection clauses on the following grounds: the Missouri statute improperly defined the practice of medicine to include naturopathy; the statute required naturopaths to qualify in non-naturopathic subjects to become licensed in the healing arts; and the statute conferred exclusive jurisdiction over naturopaths on their medical competitors. He also argued that the first amendment right of patients to select a mode of treatment was abridged by the statute.

In Stuart v. Wilson, 211 F.Supp. 700 (N.D.Tex.1962), aff'd, 371 U.S. 576, 83 S.Ct. 547, 9 L.Ed.2d 537 (1963), a three-judge district court held that the Texas Medical Practice Act's licensing requirements were directly and reasonably related to the practice of medicine in general and to naturopathy in particular. The court also held that the act as administered violated no constitutional right of the naturopaths. On appeal to the Supreme Court, the naturopaths challenged the constitutionality of requiring persons who wished to practice naturopathy to obtain a license to practice orthodox medicine and the legitimacy of the state's definition of the practice of medicine to include the practice of naturopathy. They asserted that the state created an illegal monopoly by restricting medical practice to orthodox medicine. They alleged additional con-

stitutional deprivations because the state conferred exclusive control over naturopaths on their medical competitors and restricted the rights of citizens who desired naturopathic treatment. They also argued that the board of medical examiners, which was composed entirely of medical doctors, was not competent to judge the qualifications of naturopaths.

In Beck v. McLeod, 240 F.Supp. 708 (D.S.C.1965), aff'd, 382 U.S. 454, 86 S.Ct. 645, 15 L.Ed.2d 522 (1966), a three-judge district court relied on Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177, appeal dismissed for want of a substantial federal question, 352 U.S. 939, 77 S.Ct. 263, 1 L.Ed.2d 235 (1956), to dismiss a complaint challenging the constitutionality of South Carolina's statute which abolished the practice of naturopathy and established requirements for former naturopaths who wished to become licensed physicians.

The district court based dismissal on the lack of a substantial federal question. On appeal to the Supreme Court, the naturopaths questioned the binding precedential effect of Dantzler and asserted violations of the due process clause because the statute set unreasonable qualifications for licensing, discriminated in its licensing requirements among classes of the healing arts, and established requirements bearing no reasonable relation to the knowledge necessary for the practice of naturopathy.

IV

We conclude that the naturopaths' various constitutional claims depend on a single underlying contention: that a state must recognize naturopathy as a discipline distinct from the orthodox practice of medicine whose practitioners are entitled to licensing requirements different from those imposed on other

physicians. If the naturopaths are correct in this assertion, their other contentions may well have merit, but if it fails, all of their claims must fall with it. In light of the decisions of the Supreme Court that we have reviewed, we find that the naturopaths' basic claim has been firmly, repeatedly, and authoritatively rejected. Because we discern nothing indicating that their position, once labeled insubstantial, should now be considered otherwise, we affirm the judgments of the district court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

THE IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., et al	*	
vs.	*	Civil No. Y-76-1375
UNITED STATES FOOD AND DRUG ADMINISTRATION, et al	*	

MEMORANDUM AND ORDER

The numerous plaintiffs in this action, among whom are naturopathic physicians, students training in the field, patients and organizations which support the profession of naturopathy, have brought this action in federal court in Maryland naming as defendants various federal agencies and the Secretary of Health, Education and Welfare, the State of Maryland, Baltimore County, the Maryland State Board of Pharmacy,

the Maryland Department of Health and Mental Hygiene and the Maryland Department of Licensing and Regulation. As all the parties and the Court are aware, this suit is one of many brought by the plaintiffs in several states. A motion of the plaintiffs to have their actions consolidated and heard by the Federal Judicial Panel on Multidistrict Litigation is now pending.

Motions to dismiss the action have been filed by the State of Maryland, Baltimore County, the Maryland State Board of Pharmacy, the Maryland Department of Health and Mental Hygiene and the Maryland Department of Licensing and Regulation. Pursuant to Rule 16 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation this Court may properly consider and resolve these motions as the Court's pretrial jurisdiction is unimpinged by the plaintiffs'

application to the Panel. Having considered the law and the pleadings as filed by the parties, this Court has determined that the actions against each of the "State" defendants must be dismissed.

The plaintiffs have made claims against the defendants based upon the 5th and 14th Amendments of the United States Constitution with jurisdictional bases asserted in 28 U.S.C. § 1331(a) and §1346(a)(2) and upon § 1983, 42 U.S.C., with presumably a similar assertion regarding jurisdiction. In Claims One through Four, Six and Seven, the plaintiffs seek declaratory relief in the form of pronouncements of the Court that certain definitions and powers of those practicing naturopathy are as the plaintiffs state them to be and that the State defendants have unconstitutionally restricted plaintiffs in regard to those principles and powers. In Claim Eight,

the plaintiffs seek a declaration by the Court that the defendants have violated 42 U.S.C. § 1983 by depriving the plaintiffs of the rights, privileges and immunities secured by the Constitution and outlined in Claims One through Four, Six and Seven.

I. THE SECTION 1983 CLAIMS

There is clearly no subject matter jurisdiction under 42 U.S.C. § 1983 for the claims against the State defendants because none is considered a "person" under the statute for purposes of either injunctive or declaratory relief. (Damages are not sought in this action.) There has been no indication from Congress that, in passing the Civil Rights Act of 1867, of which 42 U.S.C. § 1983 forms a part, it was making any attempt to lift the protective cloak of sovereign immunity from state governments and governmental agencies and subdivisions. Monroe v. Pape,

365 U.S. 167 (1961). Nothing in the Supreme Court's recent opinion in Fitzpatrick v. Bizner, [sic] 44 U.S.L.W. 5120, (June 28, 1976), which the plaintiffs miscite, is to the contrary. Rather the point of deliberate Congressional action as a requisite to defeat sovereign immunity is underscored, since the statute at issue in that case, Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000(e) et seq., had been specifically amended to apply to "governments, governmental agencies and political subdivisions". The plaintiffs are simply wrong in stating that "actions against county - Defendants are not barred". See, e.g., Booth v. Prince George's County, Maryland, 66 F.R.D. 466 (D.Md. 1975). There is similarly no merit in the plaintiffs' assertion that municipal corporations and other extensions of the political state body -- such as the

Maryland State Board of Pharmacy, the Maryland Department of Licensing and Regulation -- are amenable to suit under § 1983. Rather than "noting" the dissent in Kenosha v. Bruno, 412 U.S. 507 (1973), as the plaintiffs have suggested, this Court "notes" the majority opinion in that case. See, also, Hinish v. State of Maryland, 393 F. Supp. 53 (D.Md. 1975); Shapiro v. State of Maryland, 336 F. Supp. 1205 (D.Md. 1972).

All aspects of the plaintiffs' claims against the State defendants based upon 42 U.S.C. § 1983 are, therefore, dismissed.

II. THE CONSTITUTIONAL CLAIMS UNDER THE 14th AMENDMENT AND 28 U.S.C. § 1331(a)

A. Amount in Controversy

The State defendants have raised as a threshold question of subject matter jurisdiction the failure of the plaintiffs to assert in their claim the requisite

$10,000 in damages as a jurisdictional amount under 28 U.S.C. § 1331(a). The defendants have suggested that the plaintiffs have denied there has been or could be damages in excess of $10,000 by asserting in the complaint that this Court has jurisdiction under 28 U.S.C. § 1346 (a)(2). That provision gives the federal district courts exclusive jurisdiction over "claims against the United States" of under $10,000; pendant [sic] jurisdiction over other defendants and claims is possible under the statute. While this Court makes no judgment at this time concerning the appropriateness of § 1346 (a) (2) as a jurisdictional basis for a claim against the United States under the facts of this case, there is no indication that plaintiffs could not have a claim both against the United States of under $10,000 and a claim against the State defendants of over $10,000 on the federal

question grounds. Furthermore, it is clear that if the plaintiffs' claims have merit and the relief they seek were granted, this could permit several dozen physicians to practice their skills and earn fees, which could total the modest sum of $10,000 within a relatively short period. The defendants have failed to make a showing of a bad faith motive in plaintiffs' assertion of injuries to them which, in the absence of equitable relief, might exceed the jurisdictional amount under the statute. Under such circumstances, the value the plaintiff places on his rights will prevail. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1937). See cases collected in 1 Moore's Federal Practice Para. .91[1].

B. Standing and Justiciability

The defendants question whether the

plaintiffs have standing to bring this challenge to the Maryland statute and practices and whether there is in existence a sufficient case or controversy pursuant to the constitutional definition of this Court's jurisdiction, Article III, Section 2 United States Constitution, to permit consideration of the plaintiffs' claims.

The plaintiffs have filed what might be described as a "form" brief in this Court. While there is nothing per se jurisdictionally invalid about such a procedure, the complaint and its appendices reveal no individual physician, student or patient and no organization which has any contact with the State of Maryland.* There is no claim asserted

*The plaintiffs list the residence of the "Maryland Homeopathic Association" as Fairport, New York.

that any person or organization ever attempted to seek or give naturopathic treatment in Maryland and/or was prevented from doing so. While the State defendants do not deny that all persons seeking to practice medicine (according to the State's definition of that activity) or engage in the practice of pharmacy in Maryland must submit to the statutory regulations, this does not in itself establish the standing of the named plaintiffs to challenge the Maryland statutes and regulation and the operations of the regulatory agencies absent any showing of actual injury to either organizations or individuals. The key requisite is "injury in fact" and the Supreme Court has recently reiterated the importance of this element:

> Insofar as these organizations seek standing based on their special interest...their complaint must fail. Since they allege no injury to themselves as organizations, and indeed could not in the

> context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. Warth v. Seldin [422 U.S. 490 (1975)], at 511. The standing question in this suit therefore turns upon whether any individual respondent has established an actual injury...

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). No plaintiff here asserts a sufficiently "personal stake" in the outcome of this case as it applies to Maryland practices. Baker v. Carr, 369 U.S. 186 (1962). Even in the Supreme Court's broadest definition of a plaintiff with standing, e.g., United States v. S.C.R.A.P., 412 U.S. 699 (1972), it required a finding of actual injury to a named plaintiff or a member of a plaintiff organization.

Having found that there is no plaintiff with sufficient actual involvement with Maryland law and pro-

cedures, it appears clear that this Court does not have before it a "case or controversy" litigated by opposing parties possessed of the necessary adversariness to permit the Court to adjudicate constitutional questions. The Court finds the case non-justiciable as to the questions of Maryland law and practice and the Maryland defendants. Baker v. Carr, supra; Flast v. Cohen, 392 U.S. 83, 95 (1968).

C. Stare Decisis

Even if this Court were to accept jurisdiction of this case and proceed to a determination on the merits, it would immediately be met by yet another example of why this case should be dismissed. The case law provides unshakeable precedent for the idea that the State of Maryland has properly exercised its power to protect the health and well-being of its citizens by regulating the practice

of medicine, Art. 43 § 119 et seq. Ann. Maryland Code, as amended 1975, and the practice of pharmacy, Art. 43 § 249 et seq., Ann. Maryland Code, as amended 1975, and by requiring naturopathists who wish to perform procedures or prescribe or administer medications which the State has chosen to regulate, to fulfill those qualifications of licensure contained in the statutes. There has been no violation of any constitutional right of the physicians, students, patients or organizations named in the instant complaint and a finding of law to that effect was established by a three-judge Federal Court in Hitchcock v. Cellenberg, 140 F. Supp. 894 (D.Md.), aff'd, 353 U.S. 919 (1957). The United States Supreme Court affirmed.

The plaintiffs' citation of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel [sic], Inc., 425

U.S. 748 (1976), lends no support to the argument that there has been an erosion in the power of the states to set reasonable requirements for purposes of licensure of physicians and pharmacists. In Virginia State Board of Pharmacy the Court held that a state could not suppress information about an entirely lawful activity of licensed pharmacists. By anology, the State of Maryland has taken no action to suppress information regarding the lawful activities of naturopathists who obtain licenses and practice medicine or pharmacy.

III. Conclusion

Having found that the plaintiffs have failed to state a cause of action under 42 U.S.C. § 1983 and that they lack standing to challenge the constitutionality of Maryland statutes and practices under 28 U.S.C. § 1331(a), it is this 8th day of March, 1977, by the

United States District Court for the District of Maryland, ORDERED:

That each claim of the plaintiffs against the State of Maryland, Baltimore County, the Maryland State Board of Pharmacy, the Maryland Department of Health and Mental Hygiene and the Maryland Department of Licensing and Regulation be, and the same is, hereby DISMISSED.

s/Joseph H. Young
United States District Judge

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

THE IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS INC., et al.,	)	Civil Action No. A-C-76-145
Plaintiffs.	)	
vs.	)	
UNITED STATES FOOD AND DRUG ADMINISTRATION, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

The Plaintiffs bring this action alleging that the Defendants have deprived them of their constitutional right to practice the art, science, or philosophy of naturopathy in the State of North Carolina. They seek a declaratory judgment to that effect, and allege jurisdiction under 28 U.S.C.A. 1331(a), 1346(a)-(2), 2201, Rule 20 of the Federal Rules

of Civil Procedure, and 42 U.S.C.A. 1983. The State of North Carolina, the North Carolina Board of Pharmacy, the North Carolina Board of Medical Examiners, and Iredell, Forsyth, and Henderson Counties have moved to dismiss the action pursuant to Rule 12, Federal Rules of Civil Procedure. Arguments were heard on the Motions on December 30, 1976, in Asheville, and on January 24, 1977, in Rutherfordton, and after a careful consideration of the pleadings, briefs, and arguments of counsel, the Court now enters its findings and conclusions.

First, the Court addresses the Motion of the Defendant Counties in which they contend they have no authority to regulate the practice of medicine or the power to deprive the Plaintiffs of their alleged rights. The Counties argue that they are governmental subdivisions of the State and have no inherent powers.

It is their position that they can only act pursuant to statutory authority, and that no authority has been conferred upon them by the state legislature pertaining to the practice of medicine.

The Court finds the Counties' position is a correct one. The authority to regulate the practice of medicine has been delegated by the legislature to the State Board of Medical Examiners, and any attempt by a county government to usurp that authority would be ultra vires. Furthermore, the Plaintiffs have made no allegations which would indicate that the Counties have acted in such an unlawful manner, or committed any specific acts which would infringe on their alleged rights. Additionally, the Plaintiffs recognize the Counties' subordinate status by referring to them as "political subdivisions" in the Complaint. It is therefore the opinion of this Court that the

Motion to Dismiss should be allowed as to Iredell, Forsyth, and Henderson Counties.

Proceeding to the Motions to Dismiss propounded by the State of North Carolina, the North Carolina Board of Pharmacy, and the North Carolina Board of Medical Examiners, the Court will first consider the question of whether the Plaintiffs' claims under 42 U.S.C.A. 1983 are viable against these Defendants. An examination of the controlling authorities shows that it is not.

It is well settled that municipal corporations are outside the ambit of 1983 for purposes of both equitable relief and monetary damages. City of Kenosha, Wisconsin vs. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); see also Monroe v. Pape, 365 U.S. 167, 83 S.Ct. 473, 5 L.Ed.2d 492 (1961); Moye v. City of Raleigh, 503 F.2d 631 (4th

Cir. 1974). The rationale behind these decisions is the finding that a municipal corporation is not a "person" within the meaning of the statute. It appears to this Court that the same reasoning is applicable to a state, or its designated Boards, and therefore the Plaintiffs' 1983 action should be dismissed. Cf. Cooper v. Commonwealth of Virginia, No. 74-2032 (4th Cir. July 15, 1975), 526 F.2d 588 (Table).

The Court now turns to the question of whether it has jurisdiction of the action pursuant to 28 U.S.C.A. 1331(a) due to the existence of a substantial federal question. Initially, the State and its Boards contend that the requisite jurisdictional amount is not present and that the action is barred by the doctrine of sovereign immunity.

An examination of the Complaint reveals that it is alleged that the matter

in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, but because the action is for declaratory relief, recovery of that amount is not sought. Such an allegation has been found to satisfy the jurisdictional amount, nothing else appearing. Empire Box Corp. v. Willard Sulzberger Motor Co., 104 F. Supp. 762 (D. N.J. 1952); see also United Enterprises v. Dubey, 128 F.2d 843 (5th Cir. 1942), cert. den. 317 U.S. 669, 63 S.Ct. 74, 87 L. Ed. 537. In the instant case there has been no allegation that the statement in the Complaint relating to the amount in controversy was made in bad faith or is not correct. It therefore appears to the Court that the Motion to Dismiss on this basis should be denied.

Secondly, the Court examines the argument of sovereign immunity. It cannot be contested that under the Eleventh

Amendment to the United States Constitution, a State is immune from a suit in law or equity brought in federal court by a citizen of another state or by a citizen of a foreign state. Furthermore, it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. Employees of Dept. of Public Health & Welf. v. Missouri, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973); Hans v. State of Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Based upon these general principles, it would appear that the action against the State and its Boards should be dismissed. However, thorough analysis of the problem requires an examination of Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908), and its protege.

In Young, the State Attorney General of Minnesota was enjoined by a federal court from enforcing a state law reducing railroad rates and providing very severe criminal penalties for any railroad which failed to comply. The Attorney General chose to ignore the federal injunction and proceeded to seek a writ of mandamus in the state courts compelling the railroad to comply with the new law. He was adjudged guilty of contempt for violating the federal injunction and imprisoned until he dismissed the state mandamus proceeding. The case reached the United States Supreme Court on the Attorney General's petition for a writ of habeas corpus.

In reviewing that petition the Supreme Court held that if the act which the State Attorney General sought to enforce would be a violation of the Federal Constitution, he is stripped of his official or represen-

tative character and is subjected in his person to the consequences of his individual conduct. It was the reasoning of that court that the State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. Finding the initial injunction to be premised upon the state law being confiscatory in violation of due process principles, the Supreme Court dismissed the petition for a writ of habeas corpus.

By comparing Young to the present case, the Court finds that the "individual" conduct necessary to secure federal jurisdiction is lacking. In Young a state officer acted in contravention of the United States Constitution when he attempted to execute the state law. Here a body politic created by the State speaks as one and promulgates regulations relating to the licensing of physicians.

Its voice is that of the State and as such is immune from suit in federal court by way of the Eleventh Amendment. An identical situation exists with the State Board of Pharmacy.

Indeed, the Court admits that the distinction is a nebulous one. Nevertheless, it appears to be a distinction which has been followed through the years. See Oklahoma Gas & E. Co. v. Oklahoma Packing Co., 292 U.S. 386, 54 S.Ct. 732 (1934); Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80 S.Ct. 568 (1960); Employees of Dept. of Public Health & Welf. v. Missouri, supra; Dawkins v. Craig, 483 F.2d 1191 (4th Cir. 1973). Furthermore, citations reveal that the dissenting opinion of Mr. Justice Harlan in Ex Parte Young has merited a considerable following over the years. Cf. Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116 (1965). The following

excerpt of that dissent is worth quoting to modern society:

> This principle, (allowing state officers to be sued) if firmly established, would work a radical change in our governmental system . . . . It would enable the subordinate Federal courts to supervise and control the official action of the States as if they were "dependencies" or provinces. It would place the States of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the Supreme Law of the Land . . . . We must assume -- a decent respect for the States requires us to assume -- that the state courts will enforce every right secured by the Constitution. If they fail to do so, the party complaining has a clear remedy for the protection of his rights, for, he can come by writ of error, in an orderly, judicial way, from the highest court of the State to this tribunal for redress in respect of every right granted or secured by that instrument and denied by the state court. . . .

Perhaps the Young case was a just and proper decision on its peculiar facts, for the immediate threat of prosecution of the railroads and the resulting irreparable harm were compelling factors. How-

ever, as it is often said, hard facts make bad law, and it appears to this Court that such was the result of Young. In short, the Eleventh Amendment speaks clearly to the point, and federal courts should not seek to twist its language in order to deprive the state courts of the right and power to address and resolve their own particular problems. It would appear from the cases that Young should be read in the strictest sense, and that immunity should be preserved whenever possible. Cf. Employees of Dept. of Public Health & Welf. v. Missouri, supra; Dawkins v. Craig, supra.

In the instant case the Plaintiffs have sued the State Boards as a single entity and allege no impropriety in the acts of their individual members. The Eleventh Amendment covers not only suits brought against a state by name but also covers those against its officers, agents, and

representatives, where the State, although not named as such, is the real party in interest against which the relief is asked. Dawkins v. Craig, supra. The Plaintiffs acknowledged at the hearing that should they be allowed to practice naturopathy in the State of North Carolina, they would object to regulation by either of these Defendant Boards. The burden would therefore rest upon the legislature of North Carolina to resolve the issue. In brief, the relief sought is against the State itself.

Perhaps more importantly is the fact that the Plaintiffs have failed to show that remedies are not available in the state courts of North Carolina, or that they will be irreparably harmed if they are made to pursue that avenue. Cf. Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752 (1961). It therefore appears that this Court should allow the state courts to

speak to the question first without undue interference from the federal judiciary. Cf. Harrison v. N.A.A.C.P., 360 U.S. 167, 79 S.Ct. 1025 (1959); Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643 (1941). As noted by Justice Harlan, the same rights and remedies exist in the state tribunal.

Based upon the foregoing discussion, it is the conclusion of this Court that the Motion to Dismiss of the State of North Carolina, the North Carolina Board of Medical Examiners, and the North Carolina Board of Pharmacy should be allowed. However, passing mention should be given to the recent case of Fitzpatrick v. Bitzer, 96 S.Ct. 2666 (1976) upon which the Plaintiffs rely.

That case held that the Eleventh Amendment and the principle of state sovereignty which it embodies are necessarily limited by the enforcement pro-

visions of the Fourteenth Amendment. In other words, the Congress may provide for private suits against states or state officials which are constitutionally impermissible in other contexts. The Plaintiffs contend that 42 U.S.C.A. 1983 is such a provision. However, since the Court has previously found the Plaintiffs' 1983 actions not maintainable, that argument is without merit. The Plaintiffs do not allege any other statute under which they contend the Congress has expressly authorized a suit such as this one. Neither do they allege interstate commercial action or proprietary action by the State or its Boards which might entitle this suit to proceed against them. Nothing remains but to allow the Motion to Dismiss.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss of Forsyth, Iredell, and Henderson Counties, the State of North

Carolina, the North Carolina Board of Pharmacy, and the North Carolina Board of Medical Examiners be, and the same is hereby allowed.

This the 27th day of January, 1977.

s/Woodrow W. Jones
Chief Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

(ON TRANSFER FROM SOUTH CAROLINA)

THE IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS INC., et al.,	)	
Plaintiffs,	)	Civil No. Y-77-1351
vs.	)	
UNITED STATES FOOD AND DRUG ADMINISTRATION, et al.,	)	
Defendants.	)	

JUDGMENT

This action having been transferred to this Court from the United States District Court for the District of South Carolina, Columbia Division, and defendants State of South Carolina, Lexington County, The State Board of Pharmaceutical Examiners and Board of Medical Examiners having been dismissed from this action by Order of the Honorable Robert W. Hemphill,

United States District Judge, filed on July 18, 1977, and there being no just reason for delay of entry of Judgment in this action, it is, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure

EXPRESSLY ORDERED AND ADJUDGED:

That Judgment be, and the same is, hereby entered in favor of defendants State of South Carolina, Lexington County, The State Board of Pharmaceutical Examiners and Board of Medical Examiners against plaintiffs, with Costs.

s/Joseph H. Young
Joseph H. Young
United States District Judge

Dated: September 1, 1977

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

The Idaho Association of Naturopathic Physicians, Inc., a corporation, et al.,	)	
Plaintiffs,	)	Civil Action No. 76-1674
v.	)	
The United States Food and Drug Administration, et al.,	)	ORDER ON DEFENDANTS' MOTION TO VACATE STAY AND DISMISS
Defendants.	)	

This action is brought by the Idaho Association of Naturopathic Physicians and various other plaintiffs alleging that they are either naturopathic physicians, students of naturopathy or prospective patients of naturopathic physicians who are being denied rights under the state and federal constitutions as a result of South Carolina statutes which restrict

the practice of naturopathy.[1] The United States Food and Drug Administration is a defendant in this action for the purpose of challenging federal statutes which, directly or indirectly, place restrictions on the practice of naturopathy. This court issued an order on February 23, 1977 staying all proceedings in this matter until disposition of plaintiffs' motion to consolidate for pretrial proceedings which was pending before the Panel on Multidistrict Litigation. The court, now, on motion of defendants State of South Carolina, Lexington County, South Carolina State Board of Medical Examiners and South Carolina Board of Pharmaceutical Examiners, vacates its stay for the purpose of considering the motions to

---

1. §40-31-10 of the South Carolina Code reads: It shall be unlawful for any person whether heretofore licensed or not under the laws of this or any other state to practice naturopathy.

dismiss made by said state defendants. The said motions have been fully submitted and are ripe for decision and may be properly considered and resolved under this court's pretrial jurisdiction pursuant to Rule 16 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

This case should be dismissed with respect to the State of South Carolina, County of Lexington, the South Carolina State Board of Medical Examiners and the South Carolina State Board of Pharmaceutical Examiners for lack of a substantial federal question. The constitutionality of Section 40-31-10 of the South Carolina Code was considered, and upheld, by the South Carolina Supreme Court in Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177 (1957), appeal dismissed at 352 U.S. 939, 1 L.Ed.2d 235 (1956). The South Carolina Court in that case held that:

> . . . . A state, under its police power, may regulate, within reasonable bounds, for the protection of the public health the practice of either (medicine or surgery) by defining the qualifications which one must possess before being permitted to practice the same. 230 S.C. at 92.

Moreover, the court continued, "there is no constitutional right for particular persons who group themselves together, under peculiar theories of medicine, and given themselves a special name as a special school of medicine, to be dealt with and recognized as such." Plaintiffs subsequently appealed the South Carolina Supreme Court decision to the United States Supreme Court which dismissed the appeal for want of a substantial federal question.

In a later suit in federal court for an injunction against enforcement of the same South Carolina statute a three-judge panel ruled, per curiam, as follows:

> Plaintiff seeks an injunction against the enforcement of the statute of South Carolina proscribing the practice of naturopathy in that State unless the practitioner has met requirements substantially equivalent to those of ordinary physicians and has passed the examination requisite for the licensing of medical doctors. The attack is based upon the due process clause of the Fourteenth Amendment.
>
> Shortly after the passage of the Act which is now before us, an association of Naturopaths, who had earlier practiced their calling in the State of South Carolina, brought an action in the state court seeking to enjoin enforcement of the statute. There, state grounds were relied upon in addition to the constitutional contention now urged before us. The Supreme Court of South Carolina held the statute unassailable on either state or federal grounds, and the United States Supreme Court dismissed the appeal for want of a substantial federal question.
>
> The effect of the Supreme Court's dismissal of the appeal from the Supreme Court of South Carolina, on the ground that there was no substantial federal question, was tantamount to an adjudication upon the merits. As such, it substantially forecloses the

question here.[2]

This court participated in that opinion and is convinced of its continuing validity. Therefore, the action against the State of South Carolina, Lexington County, South Carolina State Board of Medical Examiners and the South Carolina Board of Pharmaceutical Examiners is dismissed for want of a substantial federal question. The case against the federal defendants is still pending and subject to consolidation by the Panel on Multi-district Litigation.

AND IT IS SO ORDERED.

s/Robert W. Hemphill
ROBERT W. HEMPHILL
United States District Judge

Greenville, South Carolina
July 18, 1977

---

2. Beck v. McLeod, 240 F. Supp. 708 (E.D. S.C. 1965), aff'd 385 U.S. 454, 86 S.Ct. 645, 15 L.Ed.2d 522.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

(ON TRANSFER FROM WYOMING)

THE IDAHO ASSOCIATION OF NATUROPATHIC PHSICIANS, INC., a corporation, et al,	)	No. Y-77-1380 Civil Docket
v.	)	
UNITED STATES FOOD AND DRUG ADMINISTRATION, et al.	)	

JUDGMENT

This action having been transferred to this Court from the United States District of Wyoming, and defendants State of Wyoming, The Wyoming State Board of Pharmacy, The Wyoming State Board of Medical Examiners, and The Department of Health and Social Services having been dismissed from this action by Order of the Honorable Ewing T. Kerr, United States District Judge, filed on July 27, 1977, and there being no just reason for delay

of entry of Judgment in this action, it is, pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure

EXPRESSLY ORDERED AND ADJUDGED:

That Judgment be, and the same is, hereby entered in favor of defendants State of Wyoming, The Wyoming State Board of Pharmacy, The Wyoming State Board of Medical Examiners, and the Department of Health and Social Services against plaintiffs, with Costs.

/s/ Joseph H. Young
Joseph H. Young
United States District Judge

Dated: September 1, 1977

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF WYOMING

THE IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., et al,	)	CIV. C76-168
Plaintiffs,	)	ORDER GRANTING MOTION TO DISMISS AS TO DEFENDANTS STATE OF WYOMING, THE WYOMING STATE BOARD OF PHARMACY, THE WYOMING STATE BOARD OF MEDICAL EXAMINERS AND THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES
vs.	)	
UNITED STATES FOOD AND DRUG ADMINISTRATION, et al,	)	
Defendants.	)	

The above-entitled matter having come on regularly for hearing before the Court upon the defendant State of Wyoming's Motion to Dismiss; plaintiffs appearing by and through their attorneys Janet Olsen and Stanley D. Crow and the defendants United States Food and Drug Administration, United States Department of Health, Education and Welfare, David

Mathews, in his capacity as Secretary of the Department of Health, Education, and Welfare of the United States of America appearing by and through Toshiro Suyematsu, United States Attorney for the District of Wyoming; Charles J. Carroll, Deputy Attorney General and Kenneth Vines, Assistant Attorney General for the State of Wyoming, appearing for and on behalf of the State of Wyoming, The Wyoming State Board of Pharmacy, The Wyoming State Board of Medical Examiners and the Department of Health and Social Services, and the Court having heard the arguments of counsel in support of said Motion and in opposition thereto, and having taken said matter under advisement and being fully advised in the premises, FINDS:

That under the Eleventh Amendment of the United States Constitution the State and its governmental agencies are immune

from suit brought in Federal Court by citizens of another state;

That the Wyoming State Board of Pharmacy, the Wyoming State Board of Medical Examiners and the Department of Health and Social Services are governmental agencies of the State of Wyoming;

That the action against the State of Wyoming and the Wyoming State Board of Pharmacy, the Wyoming State Board of Medical Examiners and the Department of Health and Social Services should be dismissed;

NOW, THEREFORE, IT IS

ORDERED the Complaint be, and the same is hereby, dismissed together with the cause as to defendants State of Wyoming, The Wyoming State Board of Pharmacy, the

Wyoming State Board of Medical Examiners and the Department of Health and Social Services.

Dated this 27th day of July 1977.

s/Ewing T. Kerr
Judge

APPENDIX G

Annotated Code of Maryland

Art. 43 §119. Definitions.

(f) "Practice of medicine" means the exercise, whether for compensation or gratuitously, of the art of science and medical diagnosis, healing, or surgery and includes:

(1) Operating on, professing to heal, prescribing for or otherwise diagnosing or treating any physical, mental or emotional ailment or supposed ailment of another.

(2) Undertaking by appliance, test, operation, or treatment to diagnose, prevent, cure, heal, prescribe for, or treat any bodily, mental or emotional ailment, or supposed ailment of another.

(3) Undertaking to treat, heal, cure or remove any physical, emotional or mental ailment or supposed ailment of

another by mental, emotional or other process exercised or invoked on the part of either the physician, the patient, or both.

(4) Assisting, attempting, inducing or causing by any means whatsoever the termination of a human pregnancy.

(5) Performing acupuncture.

(h) "Practice of medicine" shall include:

The use of the words or letters "Dr.," "Doctor," M.D." or any other title in connection with a person's name, with the intent thereby to imply that he or she is engaged in the practice of medicine or any of its branches.

(1973, ch. 556; 1974, ch. 530, §1.)

Art. 43 §120. Board of Medical Examiners established; part of Department of Health and Mental Hygiene; composition; terms; quorum; vacancy; removal of members; expenses.

The Board of Medical Examiners of the State of Maryland is hereby established, as part of the Department of Health and Mental Hygiene.

(1) It shall consist of eight members elected by the medical and chirurgical faculty of the State of Maryland. Two members to be elected by the faculty each year. Their terms shall commence first day of June next following their election. The Board of Medical Examiners of the State of Maryland, as constituted on June 30, 1970, shall continue as constituted at that time, with each member serving for the remainder of the time for which he was selected.

(2) The members shall be physicians practicing medicine in the State of Maryland.

(3) A majority of the members of the Board constitutes a quorum.

(4) The members shall serve a four-year term and may succeed themselves.

(5) In the event of a vacancy, the Board shall select a new member to serve until his successor, elected at the next annual meeting of the faculty, to serve for the remainder of such unexpired term.

(6) The Secretary of Health and Mental Hygiene on the recommendation of the Board of Medical Examiners may remove any member of the Board for neglect of duty, misconduct, or malfeasance or misfeasance in office.

(7) Members shall be reimbursed for expenses incurred while actually engaged in the performance of their duties in accordance with the standard travel regulations. (1970, ch. 736; 1975, ch. 688.)

Art. 43 §121. Powers and duties of Board; disposition of moneys collected.

The Board has the following powers

and duties:

(1) Establish and administer examinations to be taken by applicants for license to practice medicine in the State of Maryland.

(2) Establish such other qualifications of applicants as it deems advisable for license to practice medicine.

(3) License qualified applicants to practice medicine in the State of Maryland.

(4) Make an annual report to the Faculty, and to the Secretary of Health and Mental Hygiene.

(5) Issue certificates of professional standing to physicians for use in other jurisdictions.

(6) Authorize payment of expenses and compensation to its members and others.

(7) Hold one or more meetings each

year for examination of applicants. Notice of such meetings shall be made public. The Board shall also meet whenever requested by the Secretary of Health and Mental Hygiene.

(8) Maintain a list of all applicants for license in the State.

(9) Maintain a registry of physicians.

(10) Report to the Commission acts by a physician sufficient to revoke or suspend the license of, or reprimand the physician.

(11) Have a secretary-treasurer and such other officers and employees as it deems necessary.

(12) Promulgate rules and regulations necessary to give effect to this subtitle, subject to the approval of the Secretary of Health and Mental Hygiene.

(13) Establish the fee for examinations, reexaminations, registration and reregistration. All moneys collected under this subtitle shall become general funds of the State. Such moneys shall thereafter be disbursed by the Comptroller, only pursuant to an appropriation made in accordance with §§32 and 52 of Article 3 of the Constitution or pursuant to the provisions of §§1 through 15, inclusive, of Article 15A of this Code, title "Budget and Procurement," as amended from time to time. (1970, ch. 736.)

(14) Develop rules and regulations to direct and control the practice of acupuncture, but not to prohibit the performance of acupuncture by an unlicensed individual under the supervision of a licensed physician.

(1974, ch. 530, §2.)

Art. 43, §122. Practice without license and registration prohibited; exceptions.

(a) No person shall practice medicine in this State unless he is licensed by the Board and is registered in accordance with the provisions of this subtitle except as hereinafter provided.

(b) The following persons may practice without a license, but subject to rules, regulations and orders of the Board and Commission:

(1) A resident physician, intern, or student, or equivalents at any hospital or office of physician who is engaged in hospital, dispensary, or similar duties.

(3) A physician licensed by and residing in another jurisdiction when engaged in consultation with a physician in this State.

(3) A commissioned surgeon of any of the armed forces of the United States, the United States Public Health Service hospitals or the Veterans Administration

while engaged in the performance of duties incident to his commission.

(4) A physician who resides in a neighboring jurisdiction who is authorized under the laws of that jurisdiction to practice medicine therein and whose practice extends into this State, provided the physician does not open an office or have a regularly appointed place to meet patients within this State and further provided that the same privileges are extended to physicians from this State by the neighboring jurisdiction.

(5) Cardiac rescue technicians while delivering emergency health care services or while undergoing training are permitted to carry out all phases of cardio-pulmonary resuscitation, to administer drugs or intravenous solutions as directed by a licensed physician via radio, telemetry, written or oral instruc-

tion, and to obtain blood for laboratory analysis, if they

(i) Have successfully completed an advanced cardiac rescue technician course or its equivalent as determined by the Director of Emergency Medical Services and have been examined and hold certification as cardiac rescue technicians by the Board of Medical Examiners or

(ii) Are enrolled in a cardiac rescue technician program, the standards of which are set by the Board of Medical Examiners.

(6) An individual to whom duties are delegated by a licensed physician, including, but not limited to, any individual registered, certified or licensed to practice any other health profession defined by law, in accordance with regulations to be promulgated by the Board.

(7) An individual performing acupuncture under the supervision of a

licensed physician.

(c) The Board, before promulgating regulations, shall invite and consider proposals from individuals or health groups which could be affected.

(d) Where duties to be delegated fall into an area of practice already controlled by a legally constituted board, regulations regarding these duties shall be issued jointly by the Board of Medical Examiners and the other legally constituted board. Where agreement regarding the regulations cannot be reached, the regulations shall be submitted to the Secretary of the Department of Health and Mental Hygiene for a final decision. (1970, ch. 736; 1972, ch. 88; ch. 478, §1; ch. 701; 1974, ch. 530, §1; 1975, ch. 144, §1.)

Art. 43, §123. Qualifications of applicants for license.

An applicant for a license must:

(1) Be at least eighteen years of age.

(2) Be of good moral character.

(3) Have the degree of Doctor of Medicine or Doctor of Osteopathy from a school in the United States or foreign country which has standards for graduation equal to those standards established by the Association of American Medical Colleges, the Council on Medical Education of the American Medical Association, or the American Osteopathic Association. Applicants having the degree of Doctor of Osteopathy, in addition to the foregoing, must have completed a one-year internship in an intern training program approved by the American Medical Association Council on Medical Education or such other agency for the approval of intern

training programs. (1970, ch. 736.)

APPENDIX H

North Carolina General Statutes

§90-1. North Carolina Medical Society incorporated. The association of regularly graduated physicians, calling themselves the State Medical Society is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. (1858-9, c. 258, s. 1; Code, s. 3121; Rev., s. 4491; C.S., s. 6605.)

§90-2. Board of Examiners. -- In order to properly regulate the practice of medicine and surgery, there shall be established a board of regularly graduated physicians, to be known by the title of The Board of Medical Examiners of the State of North Carolina, which shall consist of seven regularly graduated physicians. (1858-9, c. 258, ss. 3, 4; Code, s. 3123; Rev., s. 4492; C.S., s.

6606; Ex. Sess. 1921, c. 44, s. 1.)

§90-3. Medical Society appoints Board. -- The Medical Society shall have power to appoint the Board of Medical Examiners. (1858-9, c. 258, s. 9; Code, s. 3126; Rev., s. 4493; C.S., s. 6607.)

§90-6. Regulations governing applicants for license, examinations, etc.; appointment of subcommittee. -- The Board of Medical Examiners is empowered to prescribe such regulations as it deem proper, governing applicants for license, admission to examinations, the conduct of applicants during examinations proper.

The Board of Medical Examiners shall appoint and maintain a subcommittee to work jointly with a subcommittee of the Board of Nursing to develop rules and regulations to govern the performance of medical acts by registered nurses. Rules and regulations developed by this sub-

committee from time to time shall govern the performance of medical acts by registered nurses and shall become effective when adopted by both the Board of Medical Examiners and the Board of Nursing. The Board of Medical Examiners shall have responsibility for securing compliance with these regulations. (C. S., s. 6610; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2; 1973, c. 92, s. 2.)

§90-9. Examination for license; scope; conditions and prerequisites. -- It shall be the duty of the Board of Medical Examiners to examine for license to practice medicine or surgery, or any of the branches thereof, every applicant who complies with the following provisions: He shall, before he is admitted to examination, satisfy the Board that he has an academic education equal to the entrance requirements of the University of North Carolina, or furnish a certifi-

cate from the superintendent of public instruction of the county that he has passed an examination upon his literary attainments to meet the requirements of entrance in the regular course of the State University. He shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college or an osteopathic college approved by the American Osteopathic Association at the time of his graduation, which time of graduation shall have been on January 1, 1960, or subsequent thereto and which medical and osteopathic schools shall require an attendance of not less than four years or for a lesser period of time approved by the Board, and supply such facilities for clinical and scientific instruction as shall meet the approval of the Board.

The examination shall cover the branches of medical science and subjects

which the Board deems necessary to determine competence to practice medicine.

If on such examination the applicant is found competent, the Board shall grant him a license authorizing him to practice medicine or surgery or any of the branches thereof.

Applicants shall be examined by number only; names and other identifying information shall not appear on examination papers. (Rev., s. 4498; 1913, c. 20, ss. 2, 3, 6; C.S., s. 6613; 1921, c. 47, s. 1; 1969, c. 612, s. 1; c. 929, s. 1; 1971, c. 1150, s. 1.)

§90-18. Practicing without license; practicing defined; penalties. -- No person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner

provided in this Article, and if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this Article, he shall not be allowed to maintain any action to collect any fee for such services. The person so practicing without license shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00), or imprisoned at the discretion of the court for each and every offense.

Any person shall be regarded as practicing medicine or surgery within the meaning of this Article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another

person: Provided, that the following cases shall not come within the definition above recited:

(1) The administration of domestic or family remedies in cases of emergency.

(2) The practice of dentistry by any legally licensed dentist engaged in the practice of dentistry and surgery.

(3) The practice of pharmacy by any legally licensed pharmacist engaged in the practice of pharmacy.

(4) The practice of medicine and surgery by any surgeon or physician of the United States army, navy, or public health service in the discharge of his official duties.

(5) The treatment of the sick or suffering by mental or spiritual means without the use of any drugs or other material means.

(6) The practice of optometry by any legally licensed optometrist engaged in the practice of optometry.

(7) The practice of midwifery by any woman who pursues the vocation of midwife.

(8) The practice of chiropody by any

legally licensed chiropodist when engaged in the practice of chiropody, and without the use of any drug.

(9) The practice of osteopathy by any legally licensed osteopath when engaged in the practice of osteopathy as defined by law, and especially G.S. 90-129.

(10) The practice of chiropractic by any legally licensed chiropractor when engaged in the practice of chiropractic as defined by law, and without the use of any drug or surgery.

(11) The practice of medicine or surgery by any reputable physician or surgeon in a neighboring state coming into this State for consultation with a resident registered physician. This proviso shall not apply to physicians resident in a neighboring state and regularly practicing in this State.

(12) Any person practicing radiology as hereinafter defined shall be deemed to be engaged in the practice of medicine within the meaning of this Article. "Radiology" shall be defined as, that method of medical practice in which demonstration and examination of the normal and abnormal structures, parts or functions of the human body are made by use of X ray. Any person

shall be regarded as engaged in the practice of radiology who makes or offers to make, for a consideration, a demonstration or examination of a human being or a part or parts of a human body by means of fluoroscopic exhibition or by the shadow imagery registered with photographic materials and the use of X rays; or holds himself out to diagnose or able to make or makes any interpretation or explanation by word of mouth, writing or otherwise of the meaning of such fluoroscopic or registered shadow imagery of any part of the human body by use of X rays; or who treats any disease or condition of the human body by application of X rays or radium. Nothing in this subdivision shall prevent the practice of radiology by any person licensed under the provisions of Articles 2, 7, 8, and 12 of this Chapter.

(13) Any act, task or function performed by an assistant to a person licensed as a physician by the Board of Medical Examiners when

a. Such assistant is approved by and annually registered with the Board as one qualified by training or experinece to function as an assistant to a physician, except that no more than two assistants may be currently registered for any physician, and

b. Such act, task or function is performed at the direction or under the supervision of such physician, in accordance with rules and regulations promulgated by the Board, and

c. The services of the assistant are limited to assisting the physician in the particular field or fields for which the assistant has been trained, approved and registered;

Provided that this subdivision shall not limit or prevent any physician from delegating to a qualified person any acts, tasks or functions which are otherwise permitted by law or established by custom.

(14) The practice of nursing by a registered nurse engaged in the practice of nursing and the performance of acts otherwise constituting medical practice by a registered nurse when performed in accordance with rules and regulations developed by a joint subcommittee of the Board of Medical Examiners and the Board of Nursing and adopted by both boards. (1858-9, c. 258, s. 2; Code, s. 3122; 1885, c. 117, s. 2; c. 261; 1889, c. 181, ss. 1, 2; Rev., ss. 3645, 4502; C.S., s. 6622; 1921, c. 47, s. 7; Ex. Sess. 1921, c. 44, s. 8; 1941, c. 163; 1967, c. 263, s. 1; 1969, c. 612, s. 5; c. 929, s. 3; 1971, c. 817, s. 1; c. 1150, s. 6; 1973, c. 92, s. 1.)

APPENDIX I

CODE OF LAWS OF SOUTH CAROLINA (1976 Annotated)

§40-31-10. Practice unlawful.

It shall be unlawful for any person whether heretofore licensed or not under the laws of this or any other State to practice naturopathy in this State.

HISTORY: 1962 Code §56-901; 1956 (49) 1624.

§40-47-10. State Board of Medical Examiners; appointment, terms and vacancies.

The State Board of Medical Examiners shall be composed of nine reputable physicians or surgeons, eight doctors of medicine and one doctor of osteopathy; provided, however, that the sole function of the osteopathic member of the Board shall be to examine applicants for licenses as doctors of osteopathy and participate in Board action concerning osteopaths. The medical doctors shall be selected one from each of the six congres-

sional districts and two from the State at large, to be nominated by the State Medical Association and the doctor of osteopathy to be nominated from the State at large, by the South Carolina Osteopathic Association and appointed and commissioned by the Governor. The terms of office of the medical doctor members of the Board shall be for a period of four years and until their successors in office shall have been appointed and qualified. The medical doctor members of the Board first appointed under the provisions of this section having been appointed two for terms of one year, two for terms of two years, two for terms of three years and two for terms of four years, the State Medical Association shall hereafter in each year nominate two members to succeed the two members whose terms expire in such year. The doctor of osteopathy member of the Board shall serve a term of four years, and un-

til his successor in office shall have been appointed and qualified. The Governor may reject any or all of the members nominated, upon satisfactory showing as to the unfitness of those rejected. In case of such rejection the former members of the Board shall hold over until their successors can be chosen in the manner as above provided. Any vacancy in the Board shall be filled in the same manner as above specified. HISTORY: 1962 Code §56-1351; 1952 Code §56-1351; 1942 Code §5151; 1932 Code §5151; Civ. C. 'ss §2401; Civ. C. '12 §1619; 1904 (24) 513; 1920 (31) 1004; 1969 (56) 754; 1970 (56) 2371.

§40-47-40. "Practice of Medicine" defined.

Any person shall be regarded as practicing medicine within the meaning of this article who (a) shall as a business treat, operate on or prescribe for any physical ailment of another, (b)

shall engage in any branch or specialty of the healing art or (c) shall diagnose, cure, relieve in any degree or profess or attempt to diagnose, cure or relieve any human disease, ailment, defect, abnormality or complaint, whether of physical or mental origin, by attendance or advice, by prescribing, using or furnishing any drug, appliance, manipulation, adjustment or method or by any therapeutic agent whatsoever.

HISTORY: 1962 Code §56-1354; 1952 Code §56-1354; 1942 Code §5150; 1932 Code §5150; Civ. C. '22 §2400; Civ. C. '12 §1618; 1904 (24) 512; 1905 (24) 938; 1908 (25) 1083; 1920 (31) 1004.

§40-47-90. Eligibility for examination.

No person shall be eligible to appear before the Board for examination unless he shall give evidence in addition to his good moral character and sobriety

that he has such preliminary and medical education as may be prescribed by the Board or as defined by law.

HISTORY: 1962 Code §56-1357; 1952 Code §56-1357; 1942 Code §5155; 1932 Code §5155; Civ. C. '22 §2405; Civ. C. '12 §1623; 1905 (24) 939; 1920 (31) 1004; 1969 (56) 754.

APPENDIX J

Wyoming Statutes

§33-327. Practice of medicine defined.--Any person shall be regarded as practicing medicine, within the meaning of this act [§§33-327 to 33-343], who shall in any manner hold himself out to the public as being engaged within this state in the diagnosis and treatment of diseases or injuries or deformities of human beings; or who shall suggest, recommend or prescribe any form of treatment for the intended palliation, relief or cure of any physical or mental ailment of any person with the intention of receiving therefor, either directly or indirectly, any fee, gift or compensation whatsoever; or who shall maintain an office for the reception, examination and treatment of any person suffering from disease or injury of body or mind;

or who shall attach the title of M.D., surgeon, doctor or any other word or abbreviation to his name indicative that such person is engaged in the practice of medicine as hereinafter defined. (Laws 1905, ch. 45 §7; C.S. 1910, §2871; C.S. 1920 §3519, R.S. 1931, §86-107; C.S. 1945, §37-2007.)

§33-328. State board of medical examiners; created; composition; appointment, qualifications and terms of members; vacancies.--The governor, by and with the consent of the senate, shall appoint five (5) regularly licensed physicians of the State of Wyoming, who shall constitute the state board of medical examiners initially. One member of such board shall be appointed for a term of two years, two members for a term of three years and two members for a term of four years, thereafter each term shall

be four years.

One such regularly licensed physician member shall possess the degree of doctor of osteopathy. Any vacancy which may occur in said board from any cause shall be filled by appointment of the governor, and the physician so appointed shall hold his office until the expiration of the term. (Laws 1899, ch. 18, §1; R.S. 1899, §2189; Laws 1905, ch. 45, §1; C.S. 1910, §2865; Laws 1917, ch. 111, §1; C.S. 1920, §3513; R.S. 1931, §86-101; C.S. 1945, §37-2001; Laws 1957, ch. 194, §1; 1965, ch. 162, §1.

§33-330. Same--Duties.--It shall be the duty of the said board to pass upon the qualifications and determine the fitness of all persons who may desire to practice medicine, surgery and obstetrics, or who may publicly profess in any manner to assume the responsibility of the care or

treatment of disease, injury or deformity of human beings in the state. (Laws 1899, ch. 18, §3; R.S. 1899, §2194; Laws 1905, ch. 45, §3; C.S. 1910, §2867; C.S. 1920, §3515; R.S. 1931, §86-103; C.S. 1945, §37-2003.)

§33-333. Application for license; qualifications, etc., of applicants; temporary license; examination procedure; issuance of certificates.--(a) (i) Every person, except as hereinafter provided, wishing to engage in the practice of medicine and surgery, or either of them, within the state, shall, immediately and prior to commencing the same, make a written application to the state medical examining board, for a license so to do. The applicant shall transmit with the application his or her diploma indicating graduation from a school of medicine or osteopathy, together with an affidavit setting forth that the diploma is genuine,

that the applicant is the rightful possessor thereof and the identical person named therein, that the diploma was obtained by pursuing the regular course of study or examination in the institution, and setting forth that he or she is a citizen of the United States.

(ii) The citizenship requirement may be waived and a temporary license granted on an annual basis at the discretion of the members of the Wyoming state board of medical examiners, providing the applicant successfully completes the ECFMG examination in addition to the other requirements of the Wyoming state board of medical examiners.

(iii) The applicant must apply annually for temporary licensure, must reside in and actively practice medicine in Wyoming and obtain United States citizenship within eight years of the date of the original temporary licensure in

order to qualify for permanent licensure.

(b) He shall appear before the state board of medical examiners in person at a time and place appointed, and shall pass an examination sufficiently strict to test his qualifications as a practitioner. The examination may be in whole or in part in writing. If a written examination is required, it shall be that deviation from the federation of the national board of the United States (flex) or its equivalent as decided by the board. If requested by the applicant, any oral examination shall be fully recorded on tape or recorded by the board at no cost to the applicant, or, if requested by the applicant, by shorthand or other method at the expense of the applicant. The board shall review the grading of the examination of any applicant upon his request or upon the request of any member of the board. Examina-

tions will embrace or cover subjects as determined by the board. An average grade of 75% in all the branches of the examination shall be required, and the applicant shall not pass lower than 60% in any one branch. The examination shall be conducted by and under the supervision of the secretary of the board, with such assistance from the other members as shall be agreed upon by them. Examinations shall be held at stated periods to suit the convenience of the board and applicants but not to exceed four examinations in any one year. The president and secretary of the state board of medical examiners shall issue certificates to all persons who successfully pass their examinations, and certificates, after being duly recorded as hereinafter provided, shall be deemed licensed to practice medicine in all branches in which the applicant has taken examination in this

state. Every applicant for license under any of the provisions of sections 33-327 through 33-343.1 of the statutes must furnish sufficient evidence to the board that he or she is of good moral character, and that he or she is not the victim of such habits as shall cause him or her to endanger the lives of those entrusted to his or her care. (Laws 1899, ch. 18, §§4,5; R.S. 1899, §2163; Laws 1905, ch. 45, §4; C.S. 1910, §2868; Laws 1917, ch. 111, §2; C.S. 1920, §3516; Laws 1925, ch. 126, §1; R.S. 1931, §86-104; C.S. 1945, §37-2004; Laws 1957, ch. 194, §2; 1963, ch. 177, §1; 1965, ch. 176, §1; 1969, ch. 114, §1; 1973, ch. 223, §1.)

§33-342. Effect of violation.--Section 1. Criminal provisions.--Any person, association, or corporation practicing medicine or surgery within the meaning of this chapter [§§33-327 to 33-343] in this

state, without complying with the provisions of this chapter, and without having first received and recorded a certificate from the state board of medical examiners as provided by law, or aiding or abetting or participating in such violation shall be guilty [guilty] of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or by imprisonment in the county jail for not more than one year, or both; and each person filing or attempting to file as his own, the diploma of another or forged affidavit of indentification, or making any false statement of any material fact in his application or examination shall be guilty of a felony and upon conviction thereof shall be imprisoned in the penitentary for a term not exceeding three years.

APPENDIX K

28 U.S.C. §1331(a)

§1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

APPENDIX L

49 U.S.C. §1983

§1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX M

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX N

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

APPENDIX O

Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

APPENDIX P

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

....

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX Q

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

The Idaho Association of Naturopathic Physicians, Inc., et al,	)	
Appellants,	)	77-1346
	)	77-1908
versus	)	77-2593
	)	77-2594
United States Food and Drug Administration, et al,	)	
Appellees.	)	

ORDER

Upon consideration of the appellants' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Butzner for a panel consisting of Judge Winter, Judge Butzner, and Judge Hall.

For the Court,

/s/ William K. Slate, II
CLERK

Supreme Court, U. S.
FILED
MAR 2 1979
MICHAEL RODAK, JR., CLERK

No. 78-983

In the Supreme Court of the United States

OCTOBER TERM, 1978

IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., ET AL., PETITIONERS

v.

FOOD AND DRUG ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-983

IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., ET AL., PETITIONERS

v.

FOOD AND DRUG ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

Petitioners are practitioners and students of naturopathic medicine, patients desiring naturopathic treatment, and associations promoting naturopathy, who have challenged a variety of state and federal regulations and statutes that they contend improperly restrict the practice of naturopathic medicine (Pet. App. B-2). For the most part, the challenge is to state and local licensing practices (Pet. App. B-4 to B-7).

The judgment of the court of appeals deals solely with the district courts' dismissal of certain state and local officials who regulate medicine and pharmacy (Pet. App. B-3, C-15, D-15 to D-16, E-2, F-2). Although petitioners also challenged certain federal statutes and regulations, and the district court dismissed the complaint against the

federal respondents in substantial part, petitioners did not appeal this decision to the court of appeals.[1]

Since the judgment at issue here did not decide any question concerning the federal parties, and because the petitioners do not seek any relief from this Court that would affect the federal parties, the federal respondents take no position concerning the proper disposition of the petition.[2]

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

---

[1]A portion of the complaint against the federal respondents remains on the docket of the Maryland district court.

[2]We have no reason to disagree with anything the court of appeals said in rejecting petitioners' contentions on the merits. See also *Friedman* v. *Rogers*, No. 77-1163 (Feb. 21, 1979), slip op. 16 n.19 (the Due Process Clause places few limits on the authority of states to regulate the professions).

DOJ-1980-03

MOTION FILED
MAR 12 1979

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-983

IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., et. al., Petitioners

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION et. al., Respondents

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

AND

BRIEF IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT BY NORTHWEST ACADEMY OF PREVENTIVE MEDICINE APPEARING AS AMICUS CURIAE

CODY,HATCH & BEDLE, INC.P.S.
GEORGE WM. CODY
JONATHAN C. HATCH
ARDEN J. BEDLE
6226 196th S.W.,P.O.Box 1034
Lynnwood, Washington 98036
(206) 775-4626
Counsel for Amicus Curiae

February, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO: 78-983

THE IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., et. al., Petitioners,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION, et. ux, Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

AND

BRIEF IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Pursuant to Rule 42 (3) of the Rules of this Court, the Northwest Academy of Preventive Medicine respectfully moves the Court for leave to file the brief Amicus Curiae annexed hereto. While Petitioner

has granted its consent,[1] Respondents have refused to do so.

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set out in the Brief in Support of a Petition for Writ of Certiorari attached hereto with this Motion.

CONCLUSION

For the reasons stated above and in the annexed brief, Northwest Academy of Preventive Medicine requests leave to file the annexed brief amicus curiae in support of the Petition for Writ of Certiorari.

Respectfully submitted,

GEORGE WM. CODY
CODY, HATCH & BEDLE, INC. P.S.
Counsel for Northwest Academy of Preventive Medicine

February, 1979

1. Copies of the consent have been filed with the Clerk of the Court.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term,1978

NO._____

THE IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., et al, Petitioners,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION, et ux, Respondents.

IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Northwest Academy of Preventive medicine is filing this brief discussion in support of the Appellant's Petition for Writ of Certiorari as described in the above-entitled action for the purpose of urging this Court to accept such Petition. It would be the intention of

the Northwest Academy of Preventive Medicine, group described herein, to Petition this Court to appear fully in the status of Amicus Curiae for the purpose of filing briefs, presenting argument to this Court with regard to this case should the Writ of Certiorari be issued by this Court.

Northwest Academy of Preventive Medicine is a group of physicians which crosses the lines into all healing arts with executive offices in Bellevue, a suburb of Seattle, Washington. The organization has been formed for the purpose of sharing medical knowledge and for supporting all strides forward in the area of full sharing of medical ideals and for purpose of enabling all practioners of the various healing arts to progress and to maintain the sanctity

of their relative professions.

The Northwest Academy of Preventive Medicine draws its membership from primarily the Northwestern states of this Country, and has practitioners in the areas of physicians and surgeons, Osteopathic physicians, Chiropractors, Naturopaths, dentists and members of other allied healing arts. The Academy in serving its function as described, has appeared Amicus Curiae in cases before the Supreme Courts of the State of California and Washington.

Upon review of its counsel and full review of the executive committee of the Academy, it appears that the above-entitled case is one which will go a long way if addressed by the Supreme Court of these United States, towards settling some of those issues which have caused considerable conflict amongst the many states

with regard to the right of any practitioner of the healing arts to preserve the sanctity of his education, his chosen profession, and his value to the public in general as a practitioner of such healing arts. It is the feeling of the members of the Academy as a block, that on very few occasions have the strict constitutional issues which effect all practitioners of the healing arts with regard to their rights to practice their chosen profession and the rights of their patients as members of the public to rely upon the learning and skill of a practitioner of the healing arts has been addressed by the Supreme Court of the United States.

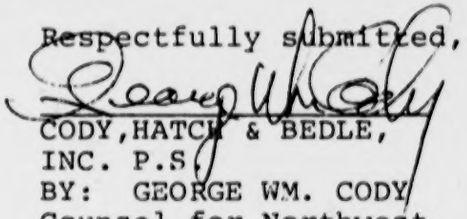
Some of these issues have been touched upon directly in those cases dealing with the issue of abortions

particularly Doe vs. Bolton"(410 U.S. 179, 93 S. Ct 739 (1972)). However, it should be noted that in all of the cases relied upon by the Fourth Circuit Court of Appeals in determining that the Petitioners in this case have raised no substantial Federal question, that none of those cases resulted in a hearing by this Supreme Court of the full issues involved in those cases or with regard to the general issues raised by the Petitioners herein in the Courts below, and as a result this would be the first occasion if this Writ is granted upon which this august court has dealt with these very substantial and primal issues within our society.

Therefore, the Northwest Academy of Preventive Medicine urges in support of the Petition for Writ of Certiorari

that this Court accept review of this particular case, and if this Court shall see fit to do so, this body would petition this Court to appear in the status of Amicus Curiae.

Respectfully submitted,



CODY, HATCH & BEDLE, INC. P.S.
BY: GEORGE WM. CODY
Counsel for Northwest Academy of Preventive Medicine